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IN THE

Supreme Court of the United States

October Term, 1961

No. [redacted] 70

RAYMOND B. RANDOLPH, JR.,
AND THIRTY-THREE OTHER PETITIONERS,

—v.—

COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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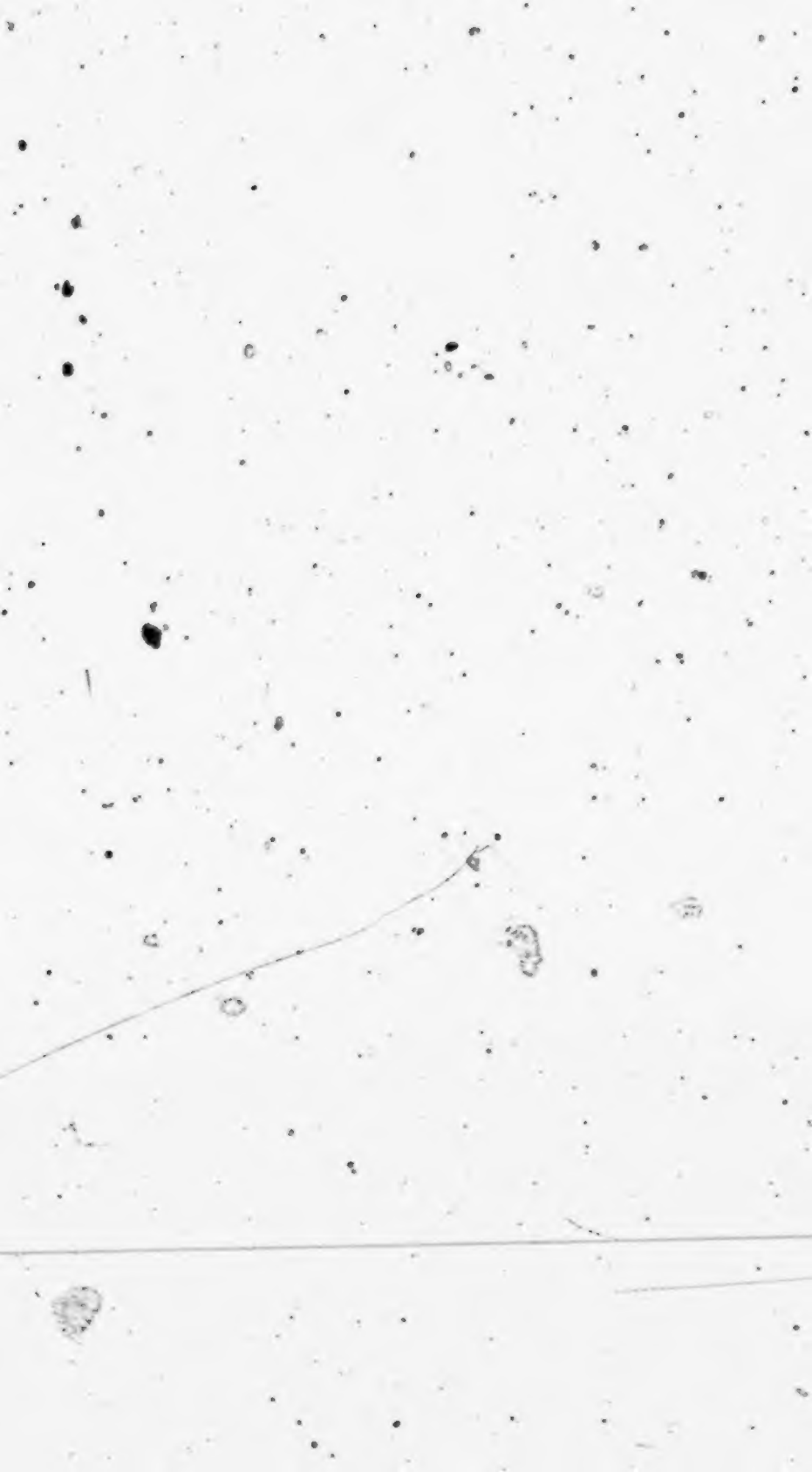

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COMMONWEALTH OF VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners (Raymond B. Randolph, Jr., Leroy M. Bray, Jr., Gordon Coleman, Gloria Collins, Robert B. Dalton, Joseph E. Ellison, Jr., Marise Ellison, Wendell T. Foster, Jr., A. Franklin, Donald Goode, Woodrow Grant, Albert Van Graves, Jr., George Wendell Harris, Jr., Yvonne Hickman, Joana Hinton, Carolyn Horne, Richard C. Jackson, Jr., Elizabeth Johnson, Ford T. Johnson, Jr., Milton Johnson, Celia E. Jones, Clarence A. Jones, Jr., John Jones McCall, Frank G. Pinkston, Larry Pridgen, Ceotis L. Pryor, Samuel Shaw, Charles M. Sherrod, Virginia Simms, Ronald Smith, Barbara Thornton, Randolph Allen Tobias, Patricia Washington, and Lois B. White) pray that a writ of certiorari issue to review the judgments of the Supreme Court of Appeals of Virgina, entered in the above-entitled cases on April 24, 1961.

Citations to Opinions Below

The opinion and judgment or order of the Supreme Court of Appeals of Virginia in the case styled *Randolph* v. *Commonwealth* is reported at 202 Va. 661, 119 S. E. 2d 817, and it is set forth in the appendix hereto, *infra*, pp. 33-39, 40 The thirty-three identical judgments or orders of the Supreme Court of Appeals, denying writs of error and *supersedeas* in the other cases "for the reasons stated in the [Randolph] case" are not reported; however, one of these judgments or orders is set forth in the appendix hereto, *infra*, p. 41.

The verbatim opinion filed by the Hustings Court of the City of Richmond in each of the thirty-four cases (see, e.g., R. Randolph 11-14) is not reported; but it is also set forth in the appendix hereto, *infra*, pp. 42-45.

Jurisdiction

The judgments of the Supreme Court of Appeals of Virginia were entered on April 24, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., §1257(3), petitioners having claimed and been denied rights, privileges, and immunities under the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Petitioners, Negro students, peacefully sought food service at lunch counters located in a public establishment which welcomed their presence and trade except at these lunch counters. They were ordered to leave the premises, and upon their refusal were arrested, tried and convicted under a statute making it a crime to " . . . remain upon the

lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian, or other person lawfully in charge of such land. . . . " Under the circumstances, were the petitioners deprived of rights protected by the:

1. equal protection and due process clauses of the Fourteenth Amendment, in that their arrest and convictions implemented a state custom, long supported and fostered by state law, of racial segregation in public places;

2. due process clause of the Fourteenth Amendment, as that clause embodies the guarantee of free expression, in that their arrest and conviction in the circumstances of this case constituted an abridgement of the freedom of expression;

3. due process clause of the Fourteenth Amendment, in that they were convicted on records barren of evidence of an element of guilt, viz., notice to them of the authority of the person ordering them out;

4. (in the alternative to 3) due process clause, in that they were convicted under a statute which gave no adequate warning of the harsh and irrational rule that one must leave a public place at the command of an unidentified stranger?

Statutory and Constitutional Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States.

2. Section 18-225 of the Virginia Code of 1950, as amended, reading as follows:

> If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than One Hundred Dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment.

Statement

These thirty-four cases, all decided on the same day (April 24, 1961) and on the same grounds by the Supreme Court of Appeals of Virginia, arose out of the same course of events, occurring in the early afternoon of February 22, 1960, at Thalhimer's Department Store in the City of Richmond. Petitioners were tried and convicted in the Police Court of the City of Richmond, all before the same judge and with the same prosecutor and defense counsel, between March 4 and March 22, 1960. On appeal to the Hustings Court of the City of Richmond, these cases were retried, *per* stipulation, on the records made in the Police Court (see Appendix, *infra*, pp. 33, 43) and all petitioners were found guilty in thirty-four verbatim opinions filed by the Hustings Court of May 26, 1960 (Appendix, *infra*, pp. 42-45). All the cases were taken to the Supreme Court of Appeals of Virginia on applications for writ of error and *supersedeas*, which court delivered an opinion only in the case styled *Randolph* v. *Virginia* (Appendix, *infra*, pp. 33-39) and decided each of the other cases on the basis of that opinion by specific reference thereto (see, e.g., Appendix *infra*, p. 41).

These cases have thus received a unitary treatment in the judicial system of Virginia. In this petition, reference will be made to the Records by name of the particular defendant. The Records are substantially identical in all parts other than the transcripts of testimony.

On February 22, 1960, petitioners, Negro students, entered Thalhimer's Department Store, to which they were invited as members of the public. While there, they attempted to obtain service at eating facilities reserved for white patrons—two lunch counters, a soup bar, and a restaurant. There is a lunch counter for Negroes in the basement. All petitioners were refused service at the facilities reserved for whites, "because they were Negroes." (R. Randoph 26, stipulation repeated verbatim in each other record.)

Each of the petitioners was then ordered to leave the store by a person who later turned out to be an official of the store. There is no hint, testimonial or inferential, that this order was motivated by any ground other than the one suggested by the circumstances—that petitioners were ordered to leave because they sought unsegregated service. There is nothing to suggest that petitioners, or any of them, were for any reason or for no reason personally obnoxious to Thalhimer's, Inc., or to any official thereof.

These records do not show with any clarity that petitioners, or any of them, had notice of the authority of the persons ordering them to leave. In some of the records that possibility is rebutted with particular clarity. For example, in the case of Robert B. Dalton, the store employee who issued the order, testified that he was a stranger to Dalton and that he did not notify Dalton in any way either of his identity or of his authority (R. Dalton 10-11).

Upon their refusal to leave, petitioners were taken before a Magistrate sitting in the store (R. Pinkston 7) and war-

rants sworn for their arrest. They were tried and convicted in Police Court, and fined twenty dollars each; these convictions, as stated above, were in effect affirmed in *de novo* trials, on the Police Court transcripts, in the Hustings Court. The Supreme Court of Appeals affirmed the Randolph conviction and rejected the other petitions for writ of error, which had the effect of affirming the judgments.

How the Federal Questions Are Presented

The federal questions which petitioners seek to have this Court review were raised in the court of first impression, the Police Court of the City of Richmond, by timely motions to dismiss and to strike the evidence in each case on the following grounds (see, e.g., R. Randolph 22-23):

> A conviction under this warrant and the evidence presented would:
>
> 1. Violate the right of this defendant of freedom of assembly under State law and the United States Constitution.
>
> 2. Violate the right of this defendant of freedom of speech and of association under State law and the United States Constitution.
>
> 3. Deny this defendant due process of law in that he was arrested and prosecuted under a State law and deprived of his liberty and ejected from a public place solely on account of his race and color.
>
> 4. Violate the rights of this defendant under the equal protection clause of the Fourteenth Amendment of the Constitution by being singled out for ejection and arrested by reason of his race and color.

5. Deny him due process of law by making it a crime for him to obey a private rule or regulation and the statute, even if constitutional on its face, is being unconstitutionally applied.

6. Make it a crime, at the whim of a private person, for the defendant to be on property upon which the general public has a right to be, and thereby denies him due process and the equal protection of the law, regardless of race.

7. Authorize and permit private persons to discriminate against this defendant on account of race, and when such discrimination is enforced by the conviction of this defendant by the State would constitute a denial of the equal protection of the laws and due process of law guaranteed by the United States Constitution.

8. Deny this defendant the equal protection of the laws since, after having been invited into the store, he was then ordered out and discriminated against by the store on account of his race, and when, as in this case, such discrimination is enforced by State legal process.

9. Violate defendant's common law and statutory right not to be excluded from the common market.

The Police Court overruled the motion in each case (see, e.g., R. Randolph 25) and petitioners were each found guilty and fined $20.00 (*Id.*).

Thereafter, on appeal of these thirty-four cases to the Hustings Court of the City of Richmond (Appendix, *infra*, p. 43), the State and each defendant stipulated and agreed that the following was to be read in conjunction with the reporter's transcript of the hearing in the Police Court of the City of Richmond (R. Randolph 26):

5. That all motions and objections made in any of the other 33 cases shall be considered by the court as having been made in this case and the rulings on such motions and objections shall be considered as having been made in this case.

The constitutional issues preserved by this stipulation were briefed and argued (Appendix, *infra*, p. 43); and, after review and consideration thereof, the Hustings Court held "that no constitutional rights of the defendants have been violated" (Appendix, *infra*, p. 45), and "that the failure of the defendants to leave the premises when requested by an official of Thalhimer's constituted trespass under Section 18-225 of the Code of Virginia" (*Id.*).

Thereupon petitioners sought, and the Hustings Court granted, a stay of execution of the sentence in order that they might apply to the Supreme Court of Appeals of Virginia for a writ of error and *supersedeas* (R. Randolph 8, 9, 10). Each such application for a writ of error and *supersedeas* made the following assignments of error (see, e.g., R. Randolph 15-17):

1. The Court erred in refusing to strike the evidence and dismiss this cause on the ground that the statute, as applied, abridges the right of the defendant to freedom of assembly under the First Amendment, as implemented by the Fourteenth Amendment, to the Constitution of the United States.

2. The Court erred in refusing to strike the evidence and dismiss this action on the ground that the statute, as applied, violates the rights of this defendant to freedom of speech and of association under the Constitution of the State of Virginia and the First Amendment, as implemented by the Fourteenth Amendment to the Constitution of the United States.

3. The Court erred in convicting this defendant of trespass since there is no evidence that the defendant knew that he was trespassing upon the property of Thalhimer's Store.

4. The Court erred in convicting this defendant of trespass, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States and contrary to the laws of the State of Virginia which recognize that a conviction of trespass may not be obtained against one on the premises under a claim of property right, since he was upon the premises in question under a claim of constitutional right.

5. The Court erred in convicting this defendant since there was no evidence to show that this defendant had any knowledge of the policy of Thalhimer's Store not to serve this defendant or persons of his race and color, and no reason was given this defendant as to why he was trespassing either at the lunch counter or in the store, nor did the employee of the store identify himself as such, nor did this defendant know of the official capacity of the employee, nor the reason for the demand to leave, thereby denying this defendant due process of law and the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

6. This defendant was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States by being convicted of a crime for having disobeyed the order to leave the premises of one allegedly in possession, without requiring that such person establish his identity or authority for making the demand and when no proof of this identity or authority was presented at the time of the demand.

7. This defendant was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States in that he was arrested, prosecuted and convicted under a state law which deprived him of his liberty and authorized his ejection from a public place, solely on account of his race and color.

8. The statute, as applied, violated the rights of this defendant under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by his being singled out for ejection and arrest by reason of his race and color.

9. The statute, as applied, denied this defendant due process of law by making it a crime for him to disobey a rule or regulation of a private person, when the State enforced such rule by establishing magistrate's office in the store and arresting defendant.

10. The statute, as applied, denied this defendant due process and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it authorized or required the conviction of this defendant of a crime for failing or refusing to obey an order of a private person, based solely upon the race or color of the defendant.

11. This defendant was denied the equal protection of the laws guaranteed to him under the Fourteenth Amendment to the Constitution of the United States when, after having been invited into the store, he was then ordered out and discriminated against by the store on account of his race and color, and when the State enforced such discrimination by the arrest and conviction of this defendant.

12. The statute, as applied, violates the common law and statutory right of this defendant not to be excluded from the common market.

The Supreme Court of Appeals disposed of these contentions adversely to petitioners in its opinion and order filed in the *Randolph* case (Appendix, *infra*, pp. 34, 36, 37, 38, 39, 40) and the orders entered in conformity therewith in the other thirty-three cases.[1]

Reasons for Granting the Writ

I

The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional Rights.

A. The arrest and conviction of these petitioners for disobedience to an order to leave a public place, motivated by a custom of segregation, which custom in turn was in part created and has long been maintained by state law and policy, constituted state enforcement of racial discrimination contrary to the due process and equal protection clauses of the Fourteenth Amendment.

These petitioners were tried and convicted for violation of a statute which makes it a crime not to get off private property when ordered to do so by the owner or by

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[1] R. Bray 15; R. Coleman 25; R. Collins 11; R. Dalton 21; R. Ellison (J.E.) 25; R. Ellison (M.) 36; R. Foster 11; R. Franklin 21; R. Goode 11; R. Grant 18; R. Graves 19; R. Harris 17; R. Hickman 12; R. Hinton 12; R. Horne 22; R. Jackson 11; R. Johnson (E.) 23; R. Johnson (F.T.) 17; R. Johnson (M.) 30; R. Jones (C.E.) 12; R. Jones (C.A.) 33; R. McCall 21; R. Pinkston 30; R. Pridgen 19; R. Pryor 33; R. Shaw 12; R. Sherrod 47; R. Simms 23; R. Smith 22; R. Thornton 13; R. Tobias 12; R. Washington 12; R. White 12.

someone acting for him. There could be no question of either the constitutionality or the desirability of such a statute, in its normal functioning as a basic sanction for the protection of private property. A man ought to have a right to order from his home anybody he prefers not to have there, and to have the help of the law in making the order effective. But Thalhimer's, a public commercial establishment to which petitioners were invited, is the home of no one, and Thalhimer's, Inc. was not in this case exercising a mere "personal" choice but has invoked state power to help it obey the force of massive custom, which in its turn has been long supported by state law and policy. The "property" interest of Thalhimer's Inc. is an exceedingly narrow one, for these petitioners, with the general public, were not so much "invited" as besought to come into Thalhimer's, so long as they abstained from the single forbidden fruit of equal treatment in a few restaurants; the "property" right actually at stake is the specific right to segregate, and no other. The cases were tried and affirmed on the theory that these sweeping differences in fact can make no difference in result—that the right to choose those who come or stay on one's property is (through the whole range of motivation, through the whole range of public connection and effect, through the whole range of property classified for other purposes as "private") an absolute, yielding to no competing considerations. Property rights are rarely if ever quite that absolute;[2] in this case the right of private property collides with the Fourteenth Amend-

[2] As Mr. Justice Holmes pointed out in *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 52 L.Ed. 828 (1908): "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Id.* at 356, 56 L.Ed. at 832.

ment right not to be subjected to public racial discrimination. *Shelley* v. *Kraemer*, 334 U. S. 1; *U. S.* v. *Beaty*, 288 F. 2d 653 (6th Cir. 1961).

Thalhimer's property is open to the public, including Negroes. As a great department store, Thalhimer's is a part of the public life of the community. In choosing to exclude Negroes from some of its restaurants, and to expel from the store all who protest against this humiliation, Thalhimer's followed a policy of public racial discrimination. It was in support of this policy of public racial discrimination that the public force was invoked, in the shape of police intervention and these convictions. The assimilation of this situation to the broadly dissimilar one of the householder who orders an unwelcome intruder to leave is not the product of skill in generalizing, but rather the result of refusal to have regard to clearly significant distinctions where these leap to the eye. Only doctrinal clumsiness could force the law to treat alike two things so utterly different.

Our doctrine is not that clumsy. Quite aside from the obvious amenability of "private" property rights to many limitations in the public interest, *Munn* v. *Illinois*, 94 U. S. 113,[3] even when these limitations root in the Constitution alone, *Marsh* v. *Alabama*, 326 U. S. 501, the action here is not in any relevant sense purely "private".

The requirement of "state action" as a prerequisite to the invocation of Fourteenth Amendment guarantees has proven an unreliable and perhaps meaningless guide among the intricacies of state involvement in activities nominally "private". The *Civil Rights Cases*, 109 U. S. 3, from which

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[3] See also, *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917); Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L.J. 315, 358-9.

the requirement stems, laid it down that "some" state action supporting the forbidden activity is enough, 109 U. S. 13; since total absence of state involvement, except possibly in cases of common crime, never occurs, the "state action" doctrine is fated to become more and more troublesome as insight deepens into the complexities of state involvement.

Nor is it clear that "state action", even under the *Civil Rights Cases*, must always be "political" action; "custom" is specifically included in the *Civil Rights* opinion, as one of the forms of "state authority", 109 U. S. 17, and it may be that behind this is the conception of the "state" as a community, imposing its will through "custom". It is questionable whether even the verbal requirement of "state action" in equal protection cases ever rested on more than a misunderstanding,[4] for the "denial" of "protection" seems to refer even more naturally to state inaction than to state action.

We have, moreover, lately been reminded by one of our most illustrious judges, in a solemn constitutional context, that "for centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand . . . " Hand, *The Bill of Rights*, p. 14. It may be that this ancient principle justifies the extension of Fourteenth Amendment protection to "private" actions which must be prohibited lest the Amendment fail of its broad purposes. (Something like this, in the doctrine of "equivalents" has long aided the patentee, *Union Paper Bag Machine Co.* v. *Murphy*, 97 U. S. 120; *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339

[4] See generally Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U.S. 3, 26-62 (1883).

U. S. 605; Fourteenth Amendment rights of full membership in the community call for no less favorable treatment. Cf. *Terry* v. *Adams*, 345 U. S. 461.)

But in the present case the involvement of the State of Virginia as a whole entity is so intimate and manifold that we need not reach these ultimate problems. As a community and as a polity, Virginia had its hands in the occurrences at Thalhimer's to an extent sufficient to satisfy any reasonable "state action" standard.

The intervention of the police in cooperation with the Thalhimer management, the sitting of the magistrate actually in the store (R. Pinkston 7-8), the invocation of the whole machinery of arrest and prosecution—these are the immediate and overt state interventions. "Whether the statute book of the State actually laid down any such rule . . . , the State, through its officer, enforced such a rule; . . . " *Civil Rights Cases, supra*, 109 U. S. at 15.

But the deeper involvement of the State arises from two facts: 1) Thalhimer's, in excluding Negroes, was not acting capriciously, or in obedience to the personal whims of those in control, or in conformity with their desires as to association, but was following a custom which is deeply characteristic of the State of Virginia as a community; 2) this custom, in turn, has been firmed up and supported by a policy which is the cornerstone policy of the State of Virginia as a political body, and which has received expression in its laws[5] and other official utterances[6]—the policy

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[5] Code of Virginia, 1950, §§18-327 and 18-328 (now Code of Virginia, 1960 Replacement Volume, §§18.1-356 and 18.1-357) requires segregation in all places of public entertainment or assemblage. Some other statutes requiring segregation in other areas of public life are cited *infra*, p. 19.

[6] As long ago as 1915, the Supreme Court of Appeals of Virginia stated that it was "the declared policy of this state that association

of segregating Negroes in public life. The refusal to see in this pattern a sufficient involvement of the State to support the application of the equal protection clause could arise only from a supposed obligation to swallow whole the formalities of "private" property, and "private" action, where the action is in its roots as public, as deeply communal, as action ever can be.

Although the Commonwealth attorney was repeatedly upheld by the Police Court judge in objections to exploration of the motives of Thalhimer's officials on this occasion, the only rational or even imaginable ground Thalhimer's, Inc. could have had for its actions on February 22, 1960 must be that of obedience to Virginia custom. Deference to the prejudices of white patrons, or fear of disorder, are merely alternative ways of referring to different aspects of this custom. Petitioners were refused service because they were Negroes, were ordered from the store, refused to leave, and were arrested. It is hard to imagine evidence

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of the races tends to breach of the peace, unsanitary conditions, discomfort, immorality and disquiet." *Hopkins v. City of Richmond*, 117 Va. 692, 86 S.E. 139, 145. The League of Women Voters was told by State Attorney General Almond that it had a duty to segregate the races at a meeting of voters. *Opinion of the State Attorney General to the Commonwealth Attorney of Arlington County*, October 16, 1956, 1 Race Rel. L. Rep. 1156 (1956). The response of the Virginia Legislature to this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483, was the adoption of a resolution of "interposition", Senate Joint Resolution No. 3, Feb. 1, 1956; see also, Opinion Letter, Feb. 14, 1956, Attorney General J. Lindsay Almond, Jr., to Honorable Robert Whitehead, 1 Race Relations Law Reporter 462. Other utterances are referred to in *James* v. *Almond*, 170 F. Supp. 331, 333-334 (D.C. E.D. Va. 1959). See also *NAACP* v. *Patty*, 159 F. Supp., 503, 513-515 (D.C. E.D. Va. 1958), vacated on other grounds 360 U.S. 167. In 1956 The Virginia House of Delegates and Senate adopted House Joint Resolution No. 97, declaring that ": . . The long established policy of this Commonwealth has been to provide for the separation of the races . . ." and that ". . . this wise policy should be preserved by all the legal means at our command . . ." 1 Race Rel. L. Rep. 589; Southern School News, April 1956, p. 13.

which could rebut the inference, from these facts, that their arrest was the direct consequence of Thalhimer's election to bow to the custom of segregation, and not a scintilla of such rebutting evidence appears.

No "right not to associate" can here be asserted on Thalhimer's behalf, even if a corporation can have such an interest, for the employees who made the decision were acting in an official rather than a personal capacity, and had nothing personal at stake. The President of Thalhimer's Inc. testified to his own utter detachment from the whole situation (R. Sherrod 37-8). The only "right not to associate" being protected was that of the white patrons of Thalhimer's Inc., but (aside from the fact that they had no voice in the matter) this is only another way of saying that Thalhimer's Inc. acted in obedience to the public custom of public segregation that prevails in Virginia, and to nothing else.

The State of Virginia as a community was thus inextricably involved in these events. But the State of Virginia as a political body was also involved, because the custom of public segregation is one to which the State has given (and continues to give) the massive support of all its political institutions. The "custom" of segregation is not a "custom" simpliciter, but a custom which has been, if not the chief end of Virginia's policy, one of its absolutely prime objectives.[7]

It is true that most of the official support given by Virginia to segregation is now, formally at least, nullified by the decisions of this Court.[8] (The segregation laws as

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[7] See note 6, *supra*.

[8] E.g., *Morgan* v. *Virginia*, 328 U.S. 373; *Brown* v. *Board of Education*, 347 U.S. 483; *New Orleans City Park Improvement Association* v. *Detiege*, 358 U.S. 54; *Gayle* v. *Browder*, 352 U.S. 903; *Holmes* v. *City of Atlanta*, 350 U.S. 879.

to public places were, however, still being enforced *de facto* in Virginia at about the time these petitioners were arrested. See, e.g., *Reid* v. *City of Norfolk*, 179 F. Supp. 768 (E. D. Va. 1960).) But a factual causal nexus is not so easily broken. If, for decades, the State of Virginia has fostered and enforced the separation of the races, that separation, as it exists today in custom, cannot be said to have no causal relation to the action of the State, merely because, much against its officially declared will,[9] the State may no longer lawfully enforce segregation laws under that name.[10] A house remains the product of its builder, even if he is forbidden to keep it in repair. And Virginia, as a political entity, built the custom of segregation.

It is, to be sure, doubtful whether segregation in restaurants was formally required by the Virginia law concerning segregation in places of public assembly (Code of Virginia, 1950 §§18-327 and 18-328, now Code of Virginia, 1960 Replacement Volume, §§18.1-356 and 18.1-357). One federal court has said it was, *Nash* v. *Air Terminal Services*, 85 F. Supp. 545 (E. D. Va. 1949); another federal court, on concession by a party, has proceeded on the assumption that it was not, *Williams* v. *Howard Johnson Restaurant*, 268 F. 2d 845 (4th Cir. 1959). After the present cases were tried, the Attorney General of Virginia (in response to an inquiry from a municipality that still, it seems, desired to enforce the segregation laws in accordance with their just

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[9] See note 6, *supra*.

[10] Efforts are nevertheless made to achieve segregation by devices short of literal enforcement of laws on their face requiring it. See e.g., *Dept. of Conservation & Development* v. *Tate*, 231 F.2d 615 (4th Cir.) *cert. denied* 352 U.S. 838 (1956) (leasing of public park facilities to lessee practicing segregation); *Chance* v. *Lambeth*, 186 F.2d 879 (4th Cir.) *cert. denied* 341 U.S. 941 (1951) (Ry. company regulation used to enforce segregation after statute declared unconstitutional); *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959) (schools closed to avoid desegregation).

construction) gave it as his opinion that the statute does not require restaurant segregation, but he relied wholly on the rule *ejusdem generis*, hardly a satisfying guide for a restaurant manager. Opinion of the State Attorney General to the Commonwealth Attorney of the City of Roanoke, Aug. 24, 1960, 5 Race Relations Law Reporter 1282 (1960). The point has not been settled by the Virginia courts; and is now without intrinsic interest, since on either construction the statute is clearly void under the decisions of this Court. But the question is not whether Virginia as a polity literally required restaurant segregation. The question is whether Virginia as a polity has contributed to maintaining the custom followed by Virginia as a community. And it is beyond any question that a State which enacts that whites and Negroes may not study together (Const. of Va. §140; Code of Va., 1950, §22-221), marry one another (Code of Va., 1950, §20-54), go to prison together (Code of Va., 1958 Replacement Volume, §53-42), join a fraternity together (Code of Va., 1953 Replacement Volume, §38.1-597), go together to the hospital for feebleminded (Code of Virginia, 1960 Supp., §37-183), wait for an airplane together (Code of Va., 1959 Replacement Volume, §56-196), get on a bus together (Code of Va., 1959 Replacement Volume, §56-326),—is making it at least vastly more likely that they will not, as a matter of custom, eat together or be fed together. Segregation is all one piece; when the State holds up the edifice at a hundred points by law, it is surely contributing to its standing up even at the points where the law does not directly take hold.

There is even good historic ground for the belief that the segregation system, of which the "custom" enforced by Thalhimer's Inc. is a part, was brought into being, or at least given firm contour in its beginnings, by state law. Woodward, *The Strange Career of Jim Crow*, 16-22, 81-85, 91-93.

Thalhimer's Inc. therefore invoked the immediate force of state law in order to continue obedience to a statewide custom that is itself the creature of state law. The element of "private" choice in this pattern is negligible, and Thalhimer's Inc. has actually no "private" interest in the matter at all, apart from the gains it may have anticipated from following the state-fostered custom. On the most stringent criteria, "state action" permeates the whole course of treatment to which these petitioners have been subjected. A contrary holding would turn upside-down the criterion stated in the *Civil Rights Cases*, for it would have to rest on the proposition that action is "private" unless it is wholly public—that the entrance of any small component of private choice into an essentially public pattern robs that pattern of its public character.

This being so, no other aspect of the present point is even arguable, for racial segregation, where infected with state power, is clearly unconstitutional.[11]

B. *The decision below conflicts with decisions of this Court securing the right to freedom of expression under the Fourteenth Amendment.*

It is stipulated in this case that petitioners, members of the Negro race, came into the store in which they were arrested for the purpose of peacefully seeking service at a counter reserved for whites (R. Randolph 26, in stipulation repeated verbatim in all other records). It cannot be doubted that such an entrance, for such a purpose, constitutes not only an attempt to eat lunch but also a solemn expression of a demand for equal treatment. Although a non-verbal expression of such a character is quite sufficient for invocation of the constitutional guarantees of

[11] See note 8, *supra*.

freedom of expression, *Thornhill* v. *Alabama*, 310 U. S. 88; *Stromberg* v. *California*, 283 U. S. 359, it is fairly inferrable, from the stipulation that petitioners were "refused service" (R. Randolph 26), that they verbally requested it, and this too was, in the circumstances, very clearly an expression of belief that it ought to be given them.

The fact that these attempts at expression of belief occurred on private property is of course not enough, without more, to strip them of constitutional protection. *Marsh* v. *Alabama*, 326 U. S. 501; *Martin* v. *Struthers*, 319 U. S. 141; see also *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793. These petitioners were, with the general public, invited onto this property, and being lawfully there they had the right to express themselves, at the least, on topics connected with their relations with the store, and hence clearly adapted to time and place. There is no hint in the records that their expression was other than moderate and peaceful. Nor is there any doubt that the machinery of the state was invoked for the sole purpose of putting an end to this expression, for it is stipulated that they were refused service (R. Randolph 26) and no reason is suggested for their attempted expulsion and arrest other than their persistence in the expression of their peaceful demand.

But in these cases there is a more specific ground for holding that the petitioners' right to free expression has been curtailed. These convictions were obtained without clear evidence, in any of the cases, of notice to petitioners of the authority, or even the identity, of the store employee who ordered them out. In some of the cases the testimony of the Commonwealth's own witness is to the effect that no notice of authority was given (e.g., R. Dalton 10-11). In none of the cases was it made clear by the courts below

that such knowledge had to exist for a conviction to be sustained.

The course of treatment of these cases leaves it unclear on just what theory the Virginia courts proceeded to disregard the question of notice of authority, but it is crystal clear that they did so disregard it. At many points in these records, the prosecutor who tried all the cases states explicitly his theory of the essentials to conviction, and notice of authority is never one of them (e.g., R. Pinkston 13). In the *Sherrod* case, the objection was raised explicitly by counsel for the defendant, in the form of a motion to strike the Commonwealth's evidence; the following quotation exhibits very clearly the theories on which the prosecutor and the police court judge were proceeding (R. 25-6):

> Mr. Martin: If Your Honor please, we move to strike the evidence of the Commonwealth in this case. It appears to me that this case is even weaker than the cases we tried yesterday. Here is a man that was in Thalhimer's, apparently on business, as a number of other people were there as customers. The Commonwealth's own witness does not deny that he was a customer there and, for some reason he refuses to state, he just asked him to leave. There is no statement from the Commonwealth's Attorney or the Commonwealth's evidence that he even identified himself as being an employee of Thalhimer's. Here is a strange man comes up to a stranger and orders him to leave the store and he refuses to leave, as I would have done or Your Honor would have done, and then he gets a warrant for him and puts the processes of the State of Virginia in motion to prosecute this man, charging him with a crime. I submit that is no crime where a stranger, an unidentified person, comes up and asks a man to leave the store in which he is a customer and

an invitee. For that reason, we move to strike the evidence.

Mr. Wilkinson: If Your Honor please, my remarks will be very brief in this case, but, as I recall the testimony, the man was advised several times to leave by Mr. Hamblet and he was advised what would happen if he did not leave, and he refused to leave, and I think the Commonwealth has carried the burden of this case.

The Court: The motion is overruled.

In a good many of the cases, it is especially clear that no rational trier of fact could have concluded, on the basis of testimony, that the defendant had notice of the authority or identity of the person ordering him to leave, for both the Commonwealth witness and the defendant testified to the contrary (e.g. R. Dalton 10-11, 14; R. Elizabeth Johnson 13-14, 16; R. Clarence A. Jones 19, 24). Yet a finding of guilty was nonetheless entered by the Police Court judge.

The Hustings Court judge, with the transcripts of the Police Court trials (and no other evidence) before him, found the defendants all guilty, in identical opinions not mentioning the question of notice of authority. No transcript before him had adequate evidence for an affirmative finding on this point, but it is even more significant that many of them affirmatively forbade such a finding, as just shown. His actions in these cases make it entirely clear that he was proceeding throughout in entire disregard of the question of the defendants' notice of the authority of the person giving the order on the basis of which conviction was predicated.

In its opinion in the Randolph case, the Supreme Court of Appeals, though it seems to find in the at best inconclusive evidence ground for the "inference" that Randolph "knew that Ames [who ordered him off] was a person in authority . . ." concedes that Ames neither identified

himself nor disclosed his authority, and says expressly that the statute "does not require this" 202 Va. 661, ——, 119 S. E. (2d) 817, 819. The Supreme Court of Appeals decided the other thirty-three cases without opinion including those in which the absence of notice to defendants was incontrovertible on the testimony.

From this history, it is impossible to be quite sure whether these cases were tried and affirmed on the substantive theory that scienter is not an element in the charged crime, or whether, on the other hand, the lack of evidence of scienter (ranging in the cases all the way from a want of clear evidence up to the decisive refutation, on the Commonwealth's own evidence, of the presence of scienter) was simply disregarded by the trier of fact. What is entirely clear is that one of these two things, or both of them in interplay, did happen. As a practical matter, in the context of constitutionally protected free expression, they are equivalents, for on either alternative the cases up to now stand for the proposition that a man, engaged in the exercise of his federally protected right of free expression, in a public place where he has been invited, must, at the command of any casual stranger who neither identifies himself nor states his authority, either cease his expression and leave, or run the chance of successful criminal prosecution. This is an unacceptable circumscription of the right of free expression.

It may be true that in these cases it did turn out, at the trial, that the persons issuing the request were authorized. But the effect of this rule on freedom of expression cannot practically be judged from the vantage point of hindsight. At the time the purported order to leave is issued, the person subjected to it would be required, under this rule, either to run the chance of jail or to cease his federally protected expression at the command of one who may well be a mere

onlooker, and who does not claim to be anything else. Such a rule, requiring hairbreadth decisions on the spur of the moment, and on insufficient or non-existent data, would inhibit and cripple the exercise of rights to which this Court has given broad protection.

On this aspect, the present case is not materially distinguishable from *Smith* v. *California*, 361 U. S. 147, 4 L. ed. (2d) 205, recently decided in this Court, except that in *Smith* the obscene books were at least in possession of the defendant, as part of his stock in trade, while in this case the authority of Thalhimer's officers, or even their identity, was in no sense a matter of which the petitioners had any reason to have any special knowledge. This case, therefore, presents an even more appealing set of circumstances than *Smith* for application of the rule of the latter case. See also *Wieman* v. *Updegraff*, 344 U. S. 183, where the penalizing of *unknowing* membership in a subversive organization was held to offend against the right of free political expression and association.

Surely, this Court would never hold that a speaker could be convicted for disobeying a command to cease speaking, given by a man in plain clothes who later turned out to be a policeman, though at the time he did not identify himself as such. Cf. *Feiner* v. *New York*, 340 U. S. 315. But the sustaining of the present convictions would require just that deference to persons who may or may not be the assistant managers of stores.

It should be added that the possibility of people in petitioners' situation being told to leave by strangers is not a mere philosophic one. The matters on which their protest was mounted are of high, excited, and quite general public interest in the affected communities.[12] There was (and in a

[12] See generally Pollitt, *op. cit. supra* note 3.

new case, would be) no reason for their assuming that anybody who told them to get out was thereunto authorized by the Vice President in Charge of Store Operations.

C. ***Petitioners either were convicted without proof of an element of the crime—their knowledge or notice of the authority of the persons ordering them to leave—or if such knowledge or notice is not an element of the crime, then they were convicted under a statute which they could not have known to embody the harsh and arbitrary rule that one who refuses to leave a public place at the command of a stranger does so at his peril. In either case, standards of the Fourteenth Amendment have been violated.***

As petitioners have shown (point IB, *supra*) none of the records in these thirty-four cases shows that petitioners herein knew or had notice of the authority or position of the persons ordering them from the premises of Thalhimer's, and some of them directly and unambiguously contradict the imputation of such notice. As exhibited in the discussion under IB, *supra*, it cannot be surely known, from the manner in which this point was dealt with in the state courts, whether those courts considered the absence of notice to be immaterial, holding scienter to be not an element of the crime, or whether, though taking it to be an element of the crime, they proceeded to conviction without evidence of its presence.

If the first alternative states the correct view, then the Virginia rule is unbelievably harsh. Whatever may be the case as to farmland or residential property, no one has any practical reason to presume that anyone who tells him to get out of a public place, to which the proprietor has invited him, is authorized to do so, when no claim of such authority is made. Particularly is this true when his presence on such publicly used property is manifestly in con-

nection with a matter which is of high controversial interest to the members of the community in general. A statutory command to quit a public place when ordered to do so by a person who later turns out to have been in authority, absent so much as a claim of authority at the time, is, in a practical situation such as that which confronted petitioners, very close to a statutory command to quit a public place whenever ordered to do so by any stranger, since the alternative is running a risk of fine or imprisonment. Whether or not such a rule might be held substantively wanting in due process, cf. *Lambert v. California*, 355 U. S. 225, it is very clear that, in the framework of Anglo-American conceptions of crime, this statute gives no fair warning of such a rule. People normally go about in public places under an assumption of general autonomy, obeying orders only from those who at least claim with some definiteness the right to give them. The petitioners, and others similarly situated, were and are entitled to assume that this general rule conditions the construction of this statute. As a matter of due process, more warning than its innocuous text ought to be required before persons are held to criminal liability under a rule so arbitrary. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

As this Court has said:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette* v. *U. S.*, 342 U. S. 246, 250.

The utterances of the *Morissette* case, it is true, were delivered in the context of this Court's responsibility to the

federal criminal law. But the holding and the opinion inescapably rest on an awareness of the pervasive character of the concept of scienter as an element in criminality.[13] The exceptions, fully canvassed in *Morissette*, 342 U. S. 252-260, have no application to the present case. It is this pervasiveness, and hence expectability, of the requirement of scienter, that makes it clear that a general statute like the present one, though failing explicitly to lay down the requirement of scienter, gives, in the whole frame of civilized conceptions of criminality, no adequate warning of an absolute liability.

Trespass statutes like the present, far from falling in the class of "public welfare" statutes as to which absolute liability has been considered appropriate (see *Morissette* v. *U. S.*, *supra*, 342 U. S. 252-260)[14] root in a long common law tradition which by no means equated civil and criminal trespass, but required for the latter such special circumstances as breach of the peace. *Henderson* v. *Commonwealth*, 49 Va. (8 Grat) 708 (Va. Gen. Ct. 1852); *Rex* v. *Storr*, 3 Burr. 1698. Cf. American Law Institute, Model Penal Code, Tentative Draft No. 2, §206.53, Comment.

In the contexts, then, of our criminal law as a whole, of criminal trespass in particular, and of normal expectations in fact, this statute conveys inadequate warning of its drastic tenor, if its meaning is that scienter is no part of the crime charged.

If, on the other hand, the correct Virginia rule is that §18-225 applies only when the accused had knowledge or notice of the authority of the person ordering him off the property, then these convictions were had without the most

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[13] See Sayre, Public Welfare Offenses, 33 Columbia L. Rev. 55, 55-6 (1933).

[14] *Id.*, at 73, 84-88.

elementary form of due process. *Thompson* v. *Louisville*, 362 U. S. 199. The records themselves would not support conviction if notice is an element. (See point IB, *supra*, pp. 21-23.)

Thus, either one of two things must be true: 1) By a draconic construction of §18-225, petitioners are held to a standard of which they had no adequate warning; or 2) on a reasonable construction, the evidence fails at a crucial point to support the convictions. In either case, due process is wanting.

II

The Public Importance of the Issues Presented.

Since February 1960, when these thirty-four petitioners sought service at eating facilities then reserved for white patrons of Thalhimer's, Inc., were refused service there solely because of their race or color, and subsequently were arrested upon their refusal to leave without obtaining service, thousands of students have participated in similar protest demonstrations. Their protests spread to 65 southern cities within two months and today they have engulfed the entire South.[15] However, despite widespread gains in nondiscriminatory treatment at lunch counters and other places of public accommodation,[16] most of these demonstrations have, as in the cases at bar, culminated in arrests and criminal prosecutions which variously present as an underlying question the issues presented herein. Many of these cases have already reached the appellate courts of

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[15] See Pollitt, *supra*, note 3, at 317-336; *Citizens in Protest: A Comment on the Student Demonstrations of 1960*, 6 How. L. J. 187-192 (1960); Foster, *Race Relations in the South, 1960*, 30 J. Negro Ed. 138, 147-149 (1961).

[16] See Petition for Cert., p. 26, *Briscoe* v. *Louisiana*, *infra* note 17.

Louisiana,[17] North Carolina,[18] Florida,[19] Maryland,[20] Arkansas,[21] Alabama,[22] Georgia,[23] South Carolina,[24] Texas,[25]

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[17] E.g., Garner v. Louisiana, cert. granted 29 U.S.L. Week 3276 (No. 617, 1960 Term; renumbered No. 26, 1961 Term); Briscoe v. Louisiana, cert. granted *Id.* (No. 618, 1960 Term, renumbered No. 27, 1961 Term); Hoston v. Louisiana, cert. granted *Id.* (No. 619, 1960 Term; renumbered No. 28, 1961 Term).

[18] E.g., Avent v. North Carolina, petition for cert. filed, 29 U.S.L. Week 3336 (No. 943, 1960 Term; renumbered No. 85, 1961 Term); Fox v. North Carolina, petition for cert. filed, *Id.* (No. 944, 1960 Term; renumbered No. 86, 1961 Term); Williams v. North Carolina, petition for cert. filed 29 U.S.L. Week 3319 (No. 915, 1960 Term; renumbered No. 82, 1961 Term).

[19] E.g., Steele v. City of Tallahassee, cert. denied 29 U.S.L. Week 3263 (No. 671, 1960 Term); Steele v. City of Tallahassee, 120 So.2d 619 (Fla. 1960); State ex rel. Steele v. Stoutamire, 119 So.2d 792 (Fla. 1960).

[20] E.g., Griffin v. State, decided June 8, 1961 (Md. Ct. App. No. 248, September 1960 Term); Drews v. State, 167 A.2d 341 (Md. 1961), jurisdictional statement filed 29 U.S.L. Week 3286 (No. 840, 1960 Term; renumbered No. 71, 1961 Term).

[21] E.g., Briggs v. State, Ark. Sup. Ct. (No. 4992) with which Smith v. State (No. 4994) and Lupper v. State (No. 4997) have been consolidated.

[22] E.g., DuBose v. City of Montgomery, 127 So.2d 845 (Ala. App. 1961); cf. King v. City of Montgomery, 128 So.2d 340 (Ala. App. 1961).

[23] E.g., Samuels v. State, 118 S.E.2d 231 (Ga. App. 1961); Martin v. State, 118 S.E.2d 233 (Ga. App. 1961); Walker v. State, 118 S.E.2d 284 (Ga. App. 1961); cf. King v. State, 119 S.E.2d 77 (Ga. 1961).

[24] E.g., see Petition for Cert., p. 27 note 15, Briscoe v. Louisiana, *supra* note 17.

[25] E.g., Crossley v. State, 342 S.W.2d 339 (Tex. Crim. App. 1961); Rucker v. State, 342 S.W.2d 325 (Tex. Crim. App. 1961); Briscoe v. State, 341 S.W.2d 432 (Tex. Crim. App. 1960); Tucker v. State, 341 S.W.2d 433 (Tex. Crim. App. 1960); Johnson v. State, 341 S.W.2d 434 (Tex. Crim. App. 1960); Rucker v. State, 341 S.W.2d 434 (Tex. Crim. App. 1960).

and Virginia;[26] countless others are still at the trial level in those states and also in Kentucky, Tennessee, West Virginia and Mississippi.

In addition to the mass litigation which has resulted from these student demonstrations, they have created new problems for local law enforcement authorities[27] and they have spurred the enactment of new laws or more stringent amendments to existing laws.[28] Moreover, the two national political parties were impelled in an election year to endorse such demonstrations and pledge stronger sanctions for civil rights in their platforms.

It is therefore of great public importance that this Court consider the issues presented herein so that the courts below, and people everywhere, can be authoritatively apprised regarding the constitutional limitations on state prosecutions of young people for engaging in this type of protest.

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[26] E.g., Thompson v. Commonwealth, petition for writ of error filed July —, 1961; Henry v. Commonwealth, writ of error denied April 25, 1961 (No. 5093); cf. Tinsley v. Commonwealth, 202 Va. 707, petition for cert. filed July 24, 1961, 30 U.S.L. Week ——.

[27] Cf. Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

[28] E.g., see Va. Acts, 1960, ch. 97; S.C. Acts, 1960, No. 743; La. Acts, 1960, Nos. 70, 77, 80; Dallas, Tex., 1960 Ordinance (6 Race Rel. L. Rep. 317).

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition or petitions for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

Present: All the Justices

Record No. 5233

RAYMOND B. RANDOLPH, JR.

—v.—

COMMONWEALTH OF VIRGINIA

OPINION BY CHIEF JUSTICE JOHN W. EGGLESTON
Richmond, Virginia, April 24, 1961

FROM THE HUSTINGS COURT OF THE CITY OF RICHMOND
W. Moscoe Huntley, Judge

Raymond B. Randolph, Jr., hereinafter called the defendant, was one of thirty-four Negroes arrested under separate warrants charging each with trespassing on the property of Thalhimer Brothers, Incorporated, in violation of Code, § 18-225, as amended. Each was convicted in the police court and upon appeal to the Hustings Court, with their consent and the concurrence of the court and the attorney for the Commonwealth entered of record, the several defendants were tried jointly by the court and without a jury. Upon consideration of the evidence the

court adjudged that each defendant was guilty of trespass as charged and assessed a fine of $20 against each. To review this judgment each defendant has filed a petition for a writ of error. We have granted the defendant, Randolph, a writ of error and deferred action on the other petitions until this case has been disposed of.

Section 18-225 of the Code of 1950 (as amended by Acts of 1956, ch. 587, p. 942; Acts of 1958, ch. 166, p. 218) reads as follows:[1]

> "§ 18-225. *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

On this appeal the defendant makes several contentions which overlap but may be fairly summarized thus: (1) The judgment is contrary to the law and the evidence in that there is no showing that the defendant was guilty of having violated the statute; (2) The statute as here applied violated the rights guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

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[1] This statute was further amended by the Acts of 1960, ch. 97, p. 113, and as so amended was recodified as Code, 1960 Replacement Volume, § 18.1-173, by the Acts of 1960, ch. 358, p. 448.

The undisputed facts are before us on the evidence heard in open court and a stipulation of the parties. Thalhimer Brothers, Incorporated, a privately owned corporation, operates a large department store in the city of Richmond. It operates lunch counters in the basement and on the first floor and a restaurant on the fourth floor. Negro patrons are served at one of the lunch counters in the basement. Only white patrons are served at the other lunch counters and in the restaurant. The separation of these facilities for serving white and Negro customers, respectively, is well known to the patrons of the store.

On February 22, 1960, the defendant and the thirty-three other Negroes who were convicted in this proceeding went to the Thalhimer store and attempted to obtain service at the facilities reserved for the use of white patrons. Because of their race they were refused service at these facilities.

Ben Ames, the personnel manager of the store and an employee of the corporation which operates it, talked with the defendant who was then at the entrance to the restaurant on the fourth floor, a facility reserved for white patrons. To use Ames' words, "I asked him to leave our store and explained to him, if he did not, that I would authorize the issuance of a warrant for his arrest." While the defendant made no reply to this request, he refused to leave the store. It is undisputed that Ames took this action at the direction of Newman Hamblett, the vice-president of Thalhimer Brothers, Incorporated, and the "director of operations" of the store. Ames did not identify himself to the defendant, who, however, did not question his authority. In the meantime, as the defendant testified, he had obeyed the command of Hamblett, whom he identified by name at the trial, to stand in line near the restaurant entrance and wait his turn. When the defendant refused to leave the store, Ames, at the further direction

of Hamblett, procured the warrant of arrest which is the basis of this prosecution.

Viewed in the light most favorable to the Commonwealth, the prevailing party, the evidence is sufficient to sustain the judgment of the lower court that the defendant was guilty of violating the statute. There is no evidence to support his contention that he was arrested because of his "race or color." On the contrary, the evidence shows that he was arrested because he remained upon the store premises after having been forbidden to do so by Ames, the duly authorized agent of the owner or custodian.

It is true that Ames did not identify himself or disclose his authority to the defendant. Aside from the fact that the statute does not require this, the evidence on behalf of the Commonwealth supports the inference that the defendant knew that Ames was a person in authority. As has been said, Ames testified that he asked the defendant to leave "our store" and explained to him that he would be arrested if he did not do so. The defendant did not question Ames' authority. It was obvious to him that Ames was acting in conjunction with Hamblett, the vice-president and director of operations of the store, whom the defendant apparently knew and identified by name. The defendant himself testified that he refused to leave the store after having been asked by Ames to do so.

Thus, it plainly appears from the evidence that the defendant violated the statute in that he willfully and purposely remained on the premises after he had been forbidden to do so by the owner's duly authorized agent.

The statute does not purport to be and is not a racial segregation law. It forbids "any person," irrespective of his race or color, "without authority of law" to "go upon or remain upon the lands or premises of another," after having been forbidden to do so. As we said in *Hall* v. *Commonwealth*, 188 Va. 72, 77, 49 S. E. 2d 369, 371 (appeal

dismissed 335 U. S. 875, 69 S. Ct. 240, 93 L. ed. 418), "The only purpose of this law is to protect the rights of the owners or those in lawful control of private property." In that case we upheld the constitutionality of the statute as applied to a member of the sect of Jehovah's Witnesses who, after proper warning, refused to leave a private apartment building.

See also, *Henderson* v. *Trailway Bus Company*, D. C. Va., F. Supp. (decided March 24, 1961, by Boreman, Circuit Judge, and Lewis and Bryan, District Judges), upholding the constitutionality of this statute as amended and recodified as Code, 1960 Replacement Volume, § 18.1-173.

The defendant does not contend that the statute is unconstitutional on its face. His argument is that the manner in which it was applied, under the circumstances of this case, amounted to a denial of rights guaranteed to him by the Fourteenth Amendment. First, he says, since the store was "open to the public" and he was there as a "business invitee," the refusal to serve him because of his "race or color" was a denial of his constitutional rights. In recent years this same argument has been advanced in a number of jurisdictions and without exception has been rejected. See *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295; *State* v. *Avent*, N. C. , 118 S. E. 2d 47; *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d 845; *Slack* v. *Atlantic White Tower System, Inc.*, D. C. Md., 181 F. Supp. 124, affirmed 4 Cir., 284 F. 2d 746; *Griffin* v. *Collins*, D. C. Md., 187 F. Supp. 149; *Wilmington Parking Authority* v. *Burton*, Del. , 157 A. 2d 894.[2]

The holding in these cases is based upon the principle that the Fourteenth Amendment "erects no shield against

[2] Reversed on other grounds. U. S. , S. Ct. , L. ed. (April 17, 1961).

merely private conduct, however discriminatory or wrongful" (*Shelley* v. *Kraemer*, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. ed. 1161, 3 A. L. R. 2d 441), and that in the absence of statute the operator of a privately owned business may accept some customers and reject others on purely personal grounds. See *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906, where the principle was applied in the operation of a privately owned restaurant.

The controlling principle is thus stated in *State* v. *Avent*, *supra*: "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or white people in company with Negroes or vice versa, if he so desires." 118 S. E. 2d, at page 51.

It is "well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." Annotation, 9 A. L. R 379. See also, Annotation, 33 A. L. R. 421. To the same effect see *Brookside-Pratt Mining Co.* v. *Booth*, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417.

As was said in *Henderson* v. *Trailway Bus Company*, *supra*, ___ F. Supp. ___, "[T]he occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use."

Hence, in the present case, the action of Thalhimer Brothers, Incorporated, in refusing to serve the defendant in its restaurant and in forbidding him to remain on its premises violated none of his constitutional rights.

The defendant next contends that when the owner of the restaurant, through its employee, procured the warrant for the defendant's arrest, this constituted State action to enforce a discriminatory rule or regulation of the restaurant contrary to the provisions of the Fourteenth Amendment. A similar argument was advanced and rejected in *State* v. *Clyburn*, *supra*, 101 S. E. 2d, at page 299; *State* v. *Avent*, *supra*, 118 S. E. 2d, at page 54; *Griffin* v. *Collins*, *supra*, 187 F. Supp., at pages 153, 154. See also, 47 Virginia Law Review 105, 119. Here the purpose of the judicial process is not to enforce a rule or regulation of the operator of the restaurant. Its purpose is to protect the rights of the proprietor who is in lawful possession of the premises and to punish the trespasser, irrespective of his race or color. See *Hall* v. *Commonwealth*, *supra*, 188 Va. 72, 49 S. E. 2d 369.

It would, indeed, be an anomalous situation to say that the proprietor of a privately owned and operated business may lawfully use reasonable force to eject a trespasser from his premises and yet may not invoke judicial process to protect his rights.

The judgment, being plainly right, is *Affirmed*.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 24th day of April, 1961.

Record No. 5233

RAYMOND B. RANDOLPH, JR.,

Plaintiff in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 26th day of May, 1960.

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore adjudged and ordered that the said judgment be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be forthwith certified to the said hustings court.

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 24th day of April, 1961.

The petition of Leroy M. Bray, Jr., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 26th day of May, 1960, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion for the reasons stated in the case of Raymond B. Randolph, Jr. v. Commonwealth of Virginia, Record No. 5233, that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

COMMONWEALTH OF VIRGINIA

v.

FRANK G. PINKSTON, *et al.*

The defendant, on February 22nd, 1960, and a number of other students, entered Thalhimer's Department Store, a private corporation, located in the City of Richmond, Virginia, and attempted to obtain service at its eating facilities reserved for white patrons. Each was refused service, and each was requested to leave the premises after being informed they would be arrested for trespassing should they fail to do so. Upon their failure to leave, and after being further advised that they would be arrested should they fail to do so, warrants were obtained and he and thirty-three other negroes were arrested.

There was a sale in progress at Thalhimers on the day of the arrest, and there were a large number of people in the store, so many in fact, it became necessary to call upon the Richmond Fire Department to keep the aisles open for traffic. One student (see Transcript—Ronald Smith, page 11) was requested by a representative of the fire department to ask his group "to move back and keep enough room because of fire rules . . .".

Since all of the defendants refused and chose not to leave the premises Mr. Newman Hamblett, Vice-President and Director of Operations for Thalhimers and other authorized store officials caused warrants to be issued for their arrest.

The thirty-four cases are before this Court on appeal from Police Court where each defendant was tried and found guilty of trespassing. By agreement of counsel the transcripts of the evidence taken in Police Court are to be taken and read as the evidence before this Court in these cases. The issues are the same in each case. Oral arguments have been made and briefs have been submitted.

Since the briefs filed in these proceedings fully cover the law on the subject the Court does not deem it necessary to review the many cases cited therein in this opinion.

Section 18.225 of the Code of Virginia, and I shall quote only the pertinent part thereof, prior to its amendment by the 1960 session of the General Assembly of Virginia, provided:

> "If any person shall without authority go upon or remain upon the lands of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land * * * he shall be deemed guilty of a misdemeanor * * * "

The evidence in this case unequivocally establishes that the defendants were requested to leave the property of Thalhimer's by a duly authorized employee; but chose instead to remain upon the premises.

The record further establishes that Thalhimers is a private corporation, and was operated by private owners and with private capital. It is under no duty to serve everyone who enters its store. It may accept some customers and reject others on purely personal grounds.

The most recent case on the subject supporting this right is that of Wilmington Parking Authority v. Butler, 157 A 2nd 894, (Delaware 1960), and is an action based on a declaratory judgment. It was contended that Eagle Coffee Shop, Inc., the lessee of Wilmington Parking Authority, could not operate its restaurant business in the

parking structure at Ninth and Shipley Streets, Wilmington, in a racially discriminatory manner. The action was commenced by a negro who was denied service by Eagle solely because of his race, color, or ancestry; this he argued abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Court reviewed the many recent decisions of Federal courts dealing with racial matters beginning with Brown v. Board of Education of Topeka, 347 U. S. 483; Nash v. Air Terminal Service, Inc., 85 F. Supp. 545; Derrington v. Plummer, 240 F. 2nd 922 (5 cir) and others.

Judge Wolcott, speaking for the Court, on page 899, said:

> "It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money; or if the operation of such facility is conducted under public auspices or control."

And again on pages 901 and 902 paragraphs (3), (4), (5) and (6) the Court said:

> "We neither condemn nor approve such private discriminatory practices for the courts are not keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.
>
> "Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealings with the emotional subject of racial relations. We are, of course, bound to follow Federal decisions, but we think we are

equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

"It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a book store, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 Del. C. paragraph 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights, paragraphs 21; 22; 52 Am. Jur. Theatres paragraph 9; Williams v. Howard Johnson's Restaurant 4 Cir 268 F. 2nd 845."

After reviewing the briefs submitted by counsel this Court is of the opinion that no Constitutional rights of the defendants have been violated, and that Thalhimer's was fully within its rights in denying service to the defendants. The Court is of the further opinion that the failure of the defendants to leave the premises when requested by an official of Thalhimers constituted trespass under Section 18.225 of the Code of Virginia.

/s/ Moscoe Huntley

5/26/60

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In the

Supreme Court of the United States

October Term 1962

No. 30

RAYMOND B. RANDOLPH, JR., ET AL.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

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Richmond 19, Virginia

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In the

Supreme Court of the United States

October Term 1961

No. 248

RAYMOND B. RANDOLPH, JR., ET AL.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

"In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. * * *

"Our right to pass on the validity or legislation is now too

much a part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court, should be indifferent to public temper and popular wishes. * * * A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution."

FRANKFURTER, J. concurring
American Fed. of Labor v.
American Sash & Door Co.,
335 U.S. 538, 555-557

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated May 22, 1962, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above

* Post, Appendix A.

mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

On March 22, 1960, petitioner Randolph was convicted in the Police Court of the City of Richmond of violating Section 18-225 of the Virginia Code and was sentenced to pay a fine of $20.00 and costs. Upon appeal to the Hustings Court of the City of Richmond, he was again convicted and a like sentence was imposed on May 26, 1960. A writ of error and supersedeas was awarded by the Supreme Court of Appeals of Virginia, and the judgment of conviction was affirmed on April 24, 1961. See, *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S. E. (2d) 817. The cause is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by petitioners on July 22, 1961.

STATEMENT OF FACTS

On February 22, 1960, petitioner Randolph and a number of other members of the Negro race entered Thalhimers Department Store in Richmond, Virginia, and attempted to obtain service therein at eating facilities reserved for white patrons (R. 24, 26).* Because of their race, all members of this group were refused service at these facilities, and Randolph was asked to leave the premises (R. 18, 26). This request was made by the store's personnel manager who was employed by Thalhimer Brothers, Incorporated, the private corporation which owns and operates Thalhimers Department Store (R. 17, 18). Randolph refused to leave the premises, although he was advised by the personnel manager that he would be arrested if he did not do so (R. 18, 25). When

* All references (R) are to pages in the printed record.

Randolph persisted in his refusal, he was arrested—upon a warrant issued at the instance of the personnel manager—for trespassing in violation of Section 18-225 of the Virginia Code (R. 2, 18).

THE STATUTE

Under attack in the instant case is Section 18-225 of the Code of Virginia (1950) as amended, which in pertinent part provides:

> "If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

QUESTION PRESENTED

Does Section 18-225 of the Virginia Code, as applied to petitioners in the case at bar, contravene the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Section 18-225 of the Virginia Code, as Applied to Petitioner in the Case at Bar, Does Not Contravene the Fourteenth Amendment to the Constitution of the United States.

Section 18-225 of the Virginia Code first appeared as Chapter 165 of the Acts of the General Assembly of 1934. Acts of Assembly (1934), Chapter 165, p. 248. With minor amendments, the language of the instant statute is substan-

tially identical to that contained in the original enactment.[1] As is manifest from its terms, the statute does no more than impose criminal sanctions for continued trespass by an individual upon the lands or premises of another after proper warning and is entirely devoid of any racial connotation whatever. *The statute does not purport to be, and is not, a racial segregation law.* It forbids trespass by anyone—whether he be a member of a racial minority or not—in going upon or remaining upon the private property of another when he is not welcome.

That the enactment in quetiosn is not a racial segregation law and has no racial connotation is conclusively established by the decision of this Court in *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369, *app. dism.* 335 U. S. 875, *reh. den.* 335 U. S. 912. In that case the Court held that the statute, as applied to a member of the sect of Jehovah's Witnesses who refused to leave the premises of a private building after proper warning, was not violative of the right to freedom of speech, press, assembly or worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 12 and 16 of the Constitution of

---

[1] The instant statute was also amended at the 1960 regular session of the General Assembly and recodified as Section 18.1-173 of the Code of Virginia (1950) as amended. The existing statute prescribes:

> "If any person shall without authority of law go upon or remain upon the lands, *buildings* or premises of another, *or any part, portion or area thereof,* after having been forbidden to do so, *either orally or in writing,* by the owner, lessee, custodian or other person lawfully in charge * *thereof,* or after having been forbidden to do so by a sign or signs posted on * *such lands, buildings, premises or part, portion or area thereof* at a place or places where *it or* they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one * *thousand* dollars or by confinement in jail not exceeding * *twelve months,* or by both such fine and imprisonment."

Virginia. Commenting upon the effect of the statute, the Court observed (188 Va. at 76-77):

> "The language of the statute is clear and unambiguous. Its provisions may be invoked only when a person has unlawfully entered or has remained upon the premises after he has been forbidden so to do by one lawfully in charge or in possession. . . . The only purpose of this law is to protect the rights of the owners or those in lawful control of private property.
>
> "We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

Equally manifest is it that invocation of the statute under the circumstances of the case at bar impairs no constitutional right of the petitioner. The record undeniably demonstrates that the petitioner was not arresed because of his race or color, but solely because he refused to leave the premises of a privately owned and operated drug store when requested to leave and persisited in remaining upon such premises after having been forbidden to do so.

Under such circumstances, resort by a private individual or corporation to the protection of a statute imposing criminal sanctions for continued trespass upon private property after proper warning presents no question whatever of conflict with the Fourteenth Amendment. Within the past five years the argument advanced by petitioner in the case at bar has been urged in various jurisdictions and uniformly rejected. See, *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. (2d) 295; *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 268 F. (2d) 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124; *aff'd. per curiam* 4 Cir., 284 F. (2d) 746; *Griffin* v. *Collins*, 187 F. Supp. 149; *State* v. *Avent*, 253 N. C. 580, 118 S. E. (2d) 47; *Drews* v. *Mary-*

land, 224 Md. 186, 167 A (2d) 341; *Griffin* v. *Maryland*, 225 Md. 442, 171 A (2d) 717; *Henderson* v. *Trailway Bus Co.*, 194 F. Supp. 423. Observations of the various judicial tribunals in certain of these cases are sufficiently significant to merit reproduction in the body of this brief.

In *State* v. *Clyburn*, *supra*, the Supreme Court of North Carolina—in a situation identical to that under consideration in the case at bar—sustained the conviction of a Negro who had been charged with unlawfully entering upon the lands of another after having been forbidden to do so and unlawfully refusing to leave that portion of the premises reserved for members of the opposite race. In that case, the defendant and other Negroes had entered the business premises of certain proprietors who were engaged in retailing ice cream and sandwiches and who operated their facility on a racially segregated basis.

Pointing out that North Carolina law imposed criminal penalties for interfering with the possession or right of possession of real estate privately held, that the possessor might accept or refuse whomsoever he pleased and for whatever whim suited his fancy and that race conferred no prerogative upon the intruder nor impaired his defense, the Supreme Court of North Carolina declared (101 S. E. (2d) at 299):

> "... the Supreme Court of the United States said in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 92 L. Ed. 1161, 3 A. L. R. 2d 441; 'Since the decision of this Court in the Civil Rights cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, *the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory*

or wrongful.' This interpretation has not been modified: Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; District of Columbia v. Thompson Co., 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d 302, certiorari denied; Dargan v. Yellow Cab Co., 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

* * *

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 269 N. Y. 249, 72 N. E. 2d 697, 1 A. L. R. 2d 1160; Terrell Wells Swimming Pool v. Rodriguez Tex. Civ. App., 182 S. E. 2d 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S., 447; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109; Goff v. Savage, 122 Wash. 194, 210 P. 374; De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d 818; Brown v. Meyer Sanitar ilk Co., 150 Kan. 931, 96 P. 2d 651; Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N. E. 2d 574; Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 305 P. 2d 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N. E. 2d 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906. The owner-operators' refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." (Italics supplied)

In *Williams* v. *Howard Johnson's Restaurant*, *supra*, a egro who had been denied service in a Howard Johnson's estaurant located in Alexandria, Virginia, because of his ce instituted suit for a declaratory judgment and injunve relief, contending that his exclusion from the restaurant question upon racial grounds violated rights secured to m by the Constitution and laws of the United States. staining the dismissal of petitioner's complaint by the

United States District Court for the Eastern District of Virginia as being "in accord with the decisions of the Supreme Court of the United States and other Federal courts", Judge Soper—speaking for the United States Court of Appeals for the Fourth Circuit—observed (268 F. (2d) at 847:

> "The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from public restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibit the States from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the State which require the segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasises the long established local custom of excluding Negroes from public restaurants and he contends that the acquiesence of the State in these practices amounts to discriminatory State action which falls within the condemnation of the Constitution. The essence of the argument is that the State licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.
>
> *"This argument fails to observe the important distinction between activities that are required by the State and those which are carried out by voluntary choice and without compulsion by the people of the State in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of State law they do not furnish a basis for the pending complaint.*
>
> * * *
>
> "The customs of the people of a State do not constitute State action within the prohibition of the Four-

teenth Amendment. As stated by the Supreme Court of the United States in *Shelley* v. *Kraemer*, 334 U. S. 1; 68 S. Ct. 836, 842, 92 L. Ed. 1161:

> " 'Since the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States*. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' " (Italics supplied)

Griffin v. *Collins, supra*, involved a class action for injunctive relief to prevent the arrest for trespass of Negroes who might visit the Glen Echo Amusement Park in Montgomery County, Maryland, in opposition to the all-white policy of its owner and operator. Plaintiffs were Negroes who had been arrested, or threatened with arrest, for trespass upon the premises of the privately owned and operated amusement park. They sought an adjudication declaring that the acts of the owner and operator of the amusement park "in utilizing governmental authority and powers of the State and the sanctions of State law to aid, support and enforce the denial to plaintiffs, solely because of their race, of admission to Glen Echo Park and enjoyment of its facilities" violated plaintiff's rights under the Constitution of the United States. *Griffin* v. *Collins, supra* at 152.

Holding that the arrest of Negro trespassers by police officers of the State of Maryland—in response to the request of an amusement park proprietor for police assistance in enforcing such proprietor's policy of excluding Negroes—did not constitute State action in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment, the Court observed (187 F. Supp. at 153-154):

"The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 1947, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161. Cf. Dawson v. Mayor & City Council of Baltimore, 4 Cir., 1955, 220 F. 2d 386, affirmed 350 U. S. 877, 76 S. Ct. 133, 100 L. Ed. 774.

"Plaintiffs concede the right of the corporate defendants, as owners and operators of Glen Echo Park, to serve or refuse to serve whomever they please, and concede that said defendants, like other property owners or operators of a private business, may use 'self-help' to eject a Negro who insists on remaining on the premises after being told to leave. Counsel argue, however, *that if the proprietor of a business calls a police officer,* deputy sheriff, or other state official to remove or arrest the Negro, such action or arrest would (1) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which forbid state-imposed racial discrimination in the field of recreational activity and (2) deprive the Negro of his rights under 42 U.S.C.A. §§ 1981 and 1983.

"Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights." (Italics supplied)

In *Henderson* v. *Trailway Bus Company, supra*, plaintiffs sough to enjoin the enforcement of Section 18.1-173 of the Virginia Code (the very enactment challenged in the instant case) upon the ground that the statute, as applied to "sit-in" demonstrations, was violative of the Fourteenth Amendment to the Constitution of the United States. Rejecting this contention and dismissing the complaint, the three-judge District Court (Boreman, Circuit Judge, and Lewis and Bryan, District Judges) observed (194 F. Supp. at 426):

> "But, in any event, the critical factor is that the statutes apply only to places where a person goes 'without authority of law', meaning property not at the time affected with a public interest. *Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion; to enter or remain upon any part of his premises which are not devoted to a public use.* *Williams* v. *Howard Johnson's Restaurant*, 4 Cir., 1959, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System*, 4 Cir., 1960, 284 F. 2d 746. *Assurance of this right is the entire and sole aim of the two code provisions before us. Hall* v. *Commonwealth, supra*, 188 Va. 72, 49 S. E. 2d 369, 371. In there sustaining the statute the Virginia Court relied in part upon *Martin* v. *City of Struthers*, 319 U. S. 141, 147, 63 S. Ct. 862, 865, 87 L. Ed. 1313, where Justice Black said:
>
> > 'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. * * *' "
> > (Italics supplied)

So far as counsel for the Commonwealth are aware, there has been no decision—State or Federal—at variance with the views expressed in the above mentioned cases. In light of these decisions, the Commonwealth submits that the constitutional validity of the Virginia statute under attack in the case at bar has been so thoroughly well settled by such a unanimity of judicial opinion that no really serious assertion of antagonism to the Fourteenth Amendment can be made. In this connection, certain fundamental similarities shared by these decisions are immediately apparent. Initially, it should be noted that each of these cases was decided the same way, and each decision was rendered by a unanimous court. *Not one dissenting judicial voice is heard.* Obviously, none of the tribunals in question experienced any difficulty in ascertaining the applicable law governing the case before it, and none hesitated to declare the rights of the parties in accordance with that law. Moreover, in each of these cases, decisions of the Supreme Court of the United States were relied upon to establish the central constitutional principle involved, i.e., that the Fourteenth Amendment to the Constitution of the United States has nothing whatever to do with the racially selective practices of private individuals and does not prohibit invocation of State enforced trespass statutes to protect individuals exercising their right to discriminate. Of particular significance is the fact that the individual court considering each of these cases stressed the decision of the United States Supreme Court in *Shelley* v. *Kraemer*, 334 U. S. 1, as supportive of its disposition of the case before it in a manner diametrically opposed to the contention of appellant in the case at bar.

Clearly this Court has settled beyond question for more than three-quarters of a century that the action inhibited by the Fourteenth Amendment is only such action as may fairly be said to be that of the States, that the Fourteenth Amend-

ment erects no shield against merely private conduct and that actions carried out by the people of a State in accordance with their own desires or social practices do not constitute actions of the State. *Civil Rights Cases*, 109 U. S. 3; *Shelley* v. *Kraemer, supra*. Counsel for the Commonwealth respectfully submit, therefore, that the case at bar does not even present a judicial—much less a substantial federal—question.

Finally, counsel for the Commonwealth believe that the language of the Supreme Court of Appeals of Virginia concerning petitioner's knowledge of the identity and authority of the individual who requested him to leave the premises of the department store is sufficiently definite to dispose of petitioner's contention regarding scienter in conclusive fashion. In this connection, the Supreme Court of Appeals of Virginia observed (202 Va. at 663-664):

> "The undisputed facts are before us on the evidence heard in open court and a stipulation of the parties. Thalhimer Brothers, Incorporated, a privately owned corporation, operates a large department store in the city of Richmond. It operates lunch counters in the basement and on the first floor and a restaurant on the fourth floor. Negro patrons are served at one of the lunch counters in the basement. Only white patrons are served at the other lunch counters and in the restaurant. *The separation of these facilities for serving white and Negro customers, respectively, is well known to the patrons of the store.*
>
> "On February 22, 1960, the defendant and the thirty-three other Negroes who were convicted in this proceeding went to the Thalhimer store and attempted to obtain service at the facilities reserved for the use of white patrons. Because of their race they were refused service at these facilities.
>
> "Ben Ames, the personnel manager of the store and an employee of the corporation which operates it,

talked with the defendant who was then at the entrance to the restaurant on the fourth floor, a facility reserved for white patrons. *To use Ames' words, 'I asked him to leave our store and explained to him, if he did not, that I would authorize the issuance of a warrant for his arrest.'* While the defendant made no reply to this request, he refused to leave the store. It is undisputed that Ames took this action at the direction of Newman Hamblett, the vice-president of Thalhimer Brothers, Incorporated, and the 'director of operations' of the store. Ames did not identify himself to the defendant, who, however, did not question his authority. *In the meantime, as the defendant testified, he had obeyed the command of Hamblett, whom he identified by name at the trial, to stand in line near the restaurant entrance and wait his turn.* When the defendant refused to leave the store, Ames, at the further direction of Hamblett, procured the warrant of arrest which is the basis of this prosecution.

"Viewed in the light most favorable to the Commonwealth, the prevailing party, the evidence is sufficient to sustain the judgment of the lower court that the defendant was guilty of violating the statute. There is no evidence to support his contention that he was arrested because of his 'race or color.' On the contrary, the evidence shows that he was arrested because he remained upon the store premises after having been forbidden to do so by Ames, the duly authorized agent of the owner or custodian.

"It is true that Ames did not identify himself or disclose his authority to the defendant. Aside from the fact that the statute does not require this, the evidence *on behalf of the Commonwealth supports the inference that the defendant knew that Ames was a person in authority. As has been said, Ames testified that he asked the defendant to leave 'our store' and explained to him that he would be arrested if he did not do so. The defendant did not question Ames' authority. It was obvious to him that Ames was acting in conjunc-*

tion with Hamblett, the vice-president and director of operations of the store, whom the defendant apparently knew and identified by name. The defendant himself testified that he refused to leave the store after having been asked by Ames to do so.

"Thus, it plainly appears from the evidence that the defendant violated the statute in that he willfully and purposely remained on the premises after he had been forbidden to do so by the owner's duly authorized agent." (Italics supplied)

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth submit that Section 18-225 of the Virginia Code, as applied to the petitioners in the case at bar, presents no question whatever of conflict with the Fourteenth Amendment to the Constitution of the United States and that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond 19, Virginia

APPENDIX A

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

WASHINGTON 25, D. C.

May 22, 1962

THE HONORABLE ROBERT Y. BUTTON
Attorney General of Virginia
Richmond, Virginia

RE: RANDOLPH, ET AL. v. VIRGINIA

No. 248, October Term, 1961

Dear Sir:

On July 22, 1961, a petition for writ of certiorari was filed in this Court in the above-entitled case.

I have been directed by the Court to request that a response be filed to the petition, and 40 printed copies of your response, together with proof of service thereof, should reach this office on or before June 5, 1962.

Very truly yours,

JOHN F. DAVIS, *Clerk*
By /s/ E. P. CULLINAN
E. P. CULLINAN
Chief Deputy

EPC:jmh
cc: T. GRAY HADDON, *Esquire*
Commonwealths' Attorney
402 City Hall
Richmond, Virginia

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